IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 53 Mis.

WILLIAM EARL FIKES,
Petitioner

v.

STATE OF ALABAMA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT OF RESPONDENT

JOHN PATTERSON,
Attorney General of Alabama

ROBERT STRAUB,
Special Assistant Attorney General
Counsel for Respondent.
Judicial Building
Montgomery 4, Ala.

WALKER PRINTING CO

TABLE OF CONTENTS

CASES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

BRIEF AND ARGUMENT ON THE MERITS

BRIEF AND ARGUMENT OF RESPONDENT

A.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Alabama, is reported as *William Earl Fikes v. State of Alabama,*

No. 53 Misc.

WILLIAM EARL FIKES,
Petitioner

v.

STATE OF ALABAMA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

81 So. 2d 303, and is found at page 337, of the printed record.

B.

QUESTIONS PRESENTED

I-A.

Whether the introduction in evidence of two confessions made during ten days of incarceration, when he was not denied the right to counsel nor visitation by members of his family, was advised of his rights and was questioned intermittently, without threats, promises, or abuse, denied the petitioner due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

I-B.

Whether under these circumstances due process was denied when petitioner offered to testify on *voir dire*, during the State's case, solely on the question of involuntariness of the confessions and the court held that cross-examination would not be limited.

II.

Whether petitioner was denied rights guaranteed by the Fourteenth Amendment when indicted in a county where Negroes comprise approximately 50 percent of the population, and no Negro has ever served on a grand jury; and where, in an attempt to comply with the law, the jury commissioners revised the jury roll prior to petitioner's indictment, and included between 250 and 300 Negroes and approximately 1500 whites,

using the same method of selection in each case.

C.

Title 30, Section 21, Code of Alabama 1940, as amended by Act No. 325, Acts of Alabama 1943, page 309:

"AN ACT

"To amend Section 21 of Title 30 of the Code of Alabama of 1940.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That Section 21 of Title 30 of the Code of Alabama of 1940 and the same is hereby amended so as to read as follows: 'The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are genereally (sic) reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a free holder or house holder his name may be placed on the jury roll and in the jury box. No person over the age of sixty five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to

do so.'

"Section 2. This Act shall be effective immediately.

"Approved July 1, 1943."

Title 30, Section 3, Code of Alabama 1940, as amended by Act No. 243, Acts of Alabama 1943, page 197:

"AN ACT

"To amend Section 3 of Title 30 of the Code of 1940.

"Be it Enacted by the Legislature of Alabama:

"Section 1. That Section 3 of Title 30 of Code of Alabama 1940 be amended so as to read as follows: Section 3 (8605) (7245) (4986) 4301) (4734) (4064) (514) PERSONS EXEMPT FROM JURY DUTY.—The following persons are exempt from jury duty, unless by their own consent: Judges of the several courts; attorneys at law during the time they practice their profession; officers of the United States; officers of the executive department of the state government; sheriffs and their deputies; clerks of the courts and county commissioners; regularly licensed and practicing physicians; dentists; pharmacists; optometrists; teachers while actually engaged in teaching; actuaries while actually engaged in their profession; officers and regularly licensed engineers of any board plying the waters of this state; passenger bus driver-operators, and driver-operators of motor-vehicles hauling freight for hire under the supervision of the Alabama Public Service Commission; railroad engineers, locomotive firemen;

conductors, train dispatchers, bus dispatchers, railroad station agents, and telegraph operators, when actually in sole charge of an office; newspaper reporters while engaged in the discharge of their duties as such; regularly licensed embalmers while actually engaged in their profession; radio broadcasting engineers and announcers when engaged in the regular performance of their duties; the superintendents, physicians, and all regular employees of the Bryce hospital in Tuscaloosa County and the Searcy Hospital in Mobile County; officers and enlisted men of the national guard and naval militia of Alabama, during their terms of service; and convict and prison guards while engaged in the discharge of their duties as such.

"Approved June 28, 1943."

Title 30, Section 30, Code of Alabama 1940:

"§ 30. DRAWING GRAND AND PETIT JURIES FROM JURY BOX.—At any session of a court requiring jurors for the next session, the judge, or where there are more than one, then any one of the judges of the court shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit juries for the first week of such session of the court, or if a grand jury is not needed for the session at least thirty persons, and as many more persons as may be needed for jury service in courts having more than one division for the first week, and after each name is drawn it shall not be returned to the jury box, and there shall be no selection of names, and must seal up the names thus drawn, and

retain possession thereof, without disclosing who are drawn until twenty days before the first day of the session of the court for which the jurors are to serve, when he shall forward these names by mail, or express, or hand the same to the clerk of the court who shall thereupon open the package, make a list of the names drawn, showing the day on which the jurors shall appear and in what court they shall serve, and entering opposite every name the occupation of the person, his place of business, and of residence, and issue a venire containing said names and information to the sheriff who shall forthwith summon the persons named thereon to appear and serve as jurors."

Title 30, Section 38, Code of Alabama 1940:

"§ 38. HEARING OF EXCUSES; EMPANELING AND ORGANIZING GRAND AND PETIT JURIES.—The court shall require all persons named in the venire to be called, and shall then hear all excuses and claims of exemptions and disqualifications, and after passing upon all of the excuses or claims, shall cause the names of all jurors in attendance upon the court on that day, and who have not been excused by the court, to be written on separate slips of paper, or cards and placed in a hat or box, and thereupon the judge of the court must, in open court, draw from the hat or box, at sessions requiring grand juries, the names of eighteen jurors who shall be empaneled and sworn as the grand jury for the sessions of the court, provided that only one grand jury is authorized by law for that session; but if more than one grand jury is authorized by law for such session, then said jurors, so empaneled, shall be the first grand jury for said ses-

sion, and any subsequent grand jury, or grand juries for such session as is now or may hereafter be authorized by law must be drawn, summoned, sworn and empaneled, as provided in this chapter during the said session, and the venire for same may contain such number of names as the judge may deem necessary. The judge must then proceed to draw from the hat or box, the names of twelve jurors who shall be empaneled and sworn as petit jury no. 1, and in like manner the judge must draw and empanel and swear petit jury no. 2, and when necessary, as many more jurors as the judge or judges of the court may deem proper, all of whom shall serve as petit jurors for that week, unless discharged sooner by the court, and may be requried to serve till any case on trial is determined. If petit juries are needed for any week or weeks of the sessions, after the first week, the judge or any two judges of said court, if there is more than one judge, shall, in like manner at such times as to him or them may seem best, draw from the jury box such number of names, not less than thirty, for each of such subsequent weeks, as will in the discretion of such judge or judges, be sufficient for the week for which same are drawn."

D.

STATEMENT OF THE FACTS

THE COMMISSION OF THE CRIME

Mrs. Jean Heinz Rockwell, was in bed, on April 24, 1953, alone except for her two children who were in her apartment with her (R. p. 181). The apartment was locked when she went to bed (R. p. 183). She waked

up about 10:15 or 10:20 P. M., to find a Negro intruder, slight of build and in his twenties, sitting on her (R. p. 183). He held a knife at her throat and threatened to kill her if she struggled with him (R. p. 184). She managed to get off the bed and struggled with him through the hall and into the living room, where they fell to the floor. When she screamed he tried to quiet her, threatened her again and told her to straighten out (R. p. 185). She managed to get the knife away from him and he ran out the back door. He was dressed in a white undershirt and blue jeans and had a towel draped over his head (R. p. 186).

The confessions of the petitioner (R. pp. 232 et seq. and 259 et seq.) bear out the testimony of Mrs. Rockwell, as to the method of entry and the attack.

The petitioner offered testimony by his employer, concerning his good reputation and his working hours (R. p. 273). He normally worked until 9:00 or 10:00 O'clock, P. M. (R. p. 273). The manager of the filling station, where petitioner worked, testified that petitioner's quitting time was 8:30 P. M., but he often stayed until the close of business (R. p. 277). There was no testimony as to the time he left work on the night the crime was committed.

Three doctors testified as to the insanity of the petitioner (R. pp. 282, 287, 292). Their conclusions were reached after only two hours of examination (R. pp. 286, 291, 294).

EVENTS LEADING TO THE CONFESSIONS

The petitioner was seen wandering around in an alley in a white neighborhood about midnight or early Sunday

morning, May 17, 1953 (R. pp. 195, 269, 270). Arresting officers were called to go to a certain filling station where they found the petitioner on the back seat of a car containing three white men (R. p. 267). He was taken to the city jail where he was booked on an open charge of investigation and placed in jail (R. pp. 194, 268).

From about 10:00 O'clock until 12:00 O'clock on Sunday morning, petitioner was questioned intermittently. He was also questioned intermittently for two and one-half or three hours on Sunday afternoon. During this time, petitioner was driven around the city in an automobile (R. p. 211). During a part of the conversations on Sunday, petitioner requested the opportunity to talk to the Sheriff of Perry County, Alabama, his home county. The sheriff was notified, came to Selma, Alabama, and rode around town with petitioner (R. pp. 205, 216).

On Monday, petitioner's employer came to visit him at his request (R. p. 205). The Captain of the Police made a warrant on Monday (R. p. 195). This warrant was served on the petitioner (R. p. 200). According to the testimony, this charge was not placed on the Recorder's docket. It was not customary to enter a charge on the Recorder's docket unless the suspect should demand a preliminary hearing (R. pp. 196, 224). Neither is a charge docketed if the suspect makes a bond to the grand jury (R. pp. 205, 224). Only those cases which are to come before the Recorder are put on that docket (R. p. 221). Petitioner was advised of his rights by Captain Baker (R. p. 196), but he did not request a preliminary hearing (R. pp. 205, 224).

It was also shown that there was nothing unusual in

the fact that the warrant was not numbered (R. pp. 197, 222, 224).

The petitioner was questioned for one and one-half or two hours beginning about nine O'clock, Monday morning (R. p. 211). In the afternoon he was taken to Kilby prison for protection (R. p. 207). There was only general conversation during the trip to Kilby prison (R. p. 212), and petitioner was admitted on the order of Circuit Judge W. E. Callen (R. p. 210). Petitioner was questioned some that afternoon and for a little while after supper (R. p. 212).

Petitioner was placed in segregation during his stay at Kilby. His cell had a comfortable bed and all conveniences but he was not allowed to mingle with the other prisoners (R. p. 323). This is customary in the case of prisoners held for other authorities (R. p. 324).

Petitioner was not questioned again until Wednesday (R. pp. 201, 212). No questioning took place Thursday morning but petitioner was questioned twice in the afternoon (R. pp. 214, 215). A tape recording of petitioner's conversation was made on Thursday, in the Chaplain's office at Kilby. No threats, promises or rewards were made to petitioner nor was any violence or abuse used against him (R. p. 191), and no one was armed. He was advised that anything he said would be recorded (R. p. 205). In this recorded statement he confessed (R. pp. 232 through 236).

No conversations were had with petitioner until Saturday, when the officers talked to him for fifteen or twenty minutes in the morning and about three and one-half hours in the afternoon (R. p. 215).

Petitioner's father visited with him on Sunday (R. p.

304). On Tuesday he made another confession, during an hour's questioning after lunch (R. pp. 215, 259). Proper predicate was laid for the introduction of this confession (R. p. 239). At no time during his stay at Kilby prison was petitioner denied food or water, or abused in any way (R. p. 322), and the longest period of questioning was not more than three and one-half hours (R. p. 243).

An attorney who came to see petitioner while he was at Kilby was not permitted to see him because he admitted he had not been retained in the case (R. p. 324). Petitioner's father had not authorized any representatives (R. p. 305). Lawyers are not permitted to solicit employment within the prison (R. p. 331).

It was not established whether this attorney had attempted his visit before or after the confessions (R. pp. 324, 325). Counsel appointed by the court were permitted to see petitioner (R. pp. 325, 332).

THE MOTION TO QUASH

Although the testimony showed that no Negroes had served on grand or petit juries in Dallas County, Alabama, there was no evidence that Negroes are presently excluded solely because of their race or that they were so excluded when the petitioner was indicted. It was shown that Negroes were often found on the venire for both grand and petit juries (R. pp. 29, 30, 38, 40, 41, 42, 46, 51, 52, 55, 57, 59, 60, 64 and 65.) They were usually struck but this was never done under any sort of agreement between defense attorneys and the solicitor of the court (R. pp. 36, 38, 52, 46 and 48). In Alabama a defendant has two strikes to the State's

one.

There were, in fact, five Negroes on the venire of the grand jury which indicted petitioner, after two had been excused, one on account of age and the other because of the previous conviction of a felony. Their names were placed in the hat along with the others but were not drawn (R. pp. 67 through 70). There were also several Negroes on the venire from which the petit jury was struck (R. p. 180).

It was shown that the jury commission had revised the jury roll and box, shortly before the petitioner's indictment (R. pp. 72, 73). This was done at the time required by law (R. p. 108).

The commission obtained the names of Negroes in the same manner as in the case of whites (R. p. 90). The commission used personal contact, registration lists, qualified voter lists, telephone directory and the city directory (R. pp. 71, 78, 79, 88). Acquaintances of the commissioners were asked to submit the names of qualified jurors (R. pp. 90, 100).

Some 250 or 300 names of Negroes were placed on the jury roll (R. pp. 80, 87), along with the names of about 1500 whites (R. pp. 82, 88). The names of these Negroes were placed on the rolls because they were thought to be qualified jurors and because the commission sought to rectify any previous omissions (R. pp. 80, 81). A diligent effort was made to find qualified Negroes as well as whites (R. p. 130), but persons who could claim exemptions under the law were not knowingly included (R. pp. 111, 112). All names put on the jury roll were also put in the jury box (R. pp. 94, 96).

There is no indication on the jury roll or in the jury box whether a name is that of a white man or a Negro (R. p. 82). Neither is there such indication on the venire (R. pp. 36, 39). Therefore, by merely examining the roll in court, the commissioners were only able to positively identify between fifty (R. p. 160) and 198 (R. p. 128) Negroes.

It was shown that in drawing a grand jury, the names of the 60 to 80 persons drawn for jury duty are placed in a hat and 18 are drawn for the grand jury (R. p. 59). In conducting such drawing, no exclusion was ever practiced, and no names drawn on the venire were ever put aside (R. p. 116).

It was also shown that approximately 90 percent of the criminal cases in the courts of Dallas County, involved Negroes (R. p. 125), and that a great many of them lived in adultery (R. p. 124).

E.

ARGUMENT

I-A.

PETITIONER'S FUNDAMENTAL RIGHTS WERE NOT VIOLATED BY THE RECEPTION IN EVIDENCE OF THE CONFESSIONS MADE BY HIM.

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397;

Gallegos v. Nebraska, 342 U. S. 55, 96 L. Ed. 86, 72 S. Ct. 141;

Stein v. New York, 346 U. S. 156, 97 L. Ed. 1522,

73 S. Ct. 1077;

Stroble v. California, 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599;

Lisbena v. California, 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280;

Ingram v. State, 34 Ala. App. 597, 42 So. 2d 30.

The pititioner contends that the evidence presented in the trial court showed his confession to be the result of psychological coercion. He bases this on testimony concerning the detention and questioning in Kilby prison. It will be noted from the detailed extract of the record, there was absolutely no evidence of physical abuse. Petitioner was placed in Kilby prison as a protective measure. He was advised of his rights and was permitted to see those persons he wished to see, namely, the sheriff of his home county and his employer. The questioning was not incessant and he was not denied food, water or sleep. Between confessions he was visited by his father. The only attempt by an attorney to see him was by an attorney who admitted that he did not represent the petitioner. It was shown that no one was armed at the time the confessions were obtained. It is questionable whether or not he was brought before a magistrate, although testimony shows that he was in prison on an order of the Circuit Judge of Dallas County, Alabama.

In Alabama, the failure of an officer to comply with the statutory technicalities of properly processing an arrest does not render involuntary a confession other-

wise shown to be voluntary. See *Ingram v. State.*[1] In *Stein v. New York,*[2] the accused prisoners were not taken before a magistrate as is required by New York law. This Court held in that case that this was a fact relevant to be considered but that it of itself did not require the exclusion of confession obtained at that time.

In *Brown v. Allen,*[3] the accused, an illiterate, was held for five days before being charged. He was given no preliminary hearing for eighteen days after his arrest and no counsel was provided. The confession was obtained prior to the preliminary hearing and the apointment of counsel. The court stated that there was no evidence of physical coercion or prolonged questioning. There were no promises of reward and he was not denied counsel of his choice. This Court held as follows: "Mere detention and police examination in private of one in official state custody do not render involuntary the statements or confessions made by the person so detained."

In the instant case, there was no prolonged questioning. The testimony shows that the petitioner was questioned for three and one-half hours at most, at any one time. He was given ample time for sleeping and eating.

In *Gallegos v. Nebraska,*[4] a thirty-eight year old Mexican farm hand, who could neither speak nor write English was held without charge or arraignment for twenty-three days and questioned at length during that time. Again this Court held that such fact could be considered but would not render the confession involun-

---

[1] Ingram v. State, 34 Ala. App. 597, 42 So. 2d 30.

[2] Stein v. New York, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077.

[3] Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397.

[4] Gallegos v. Nebraska, 342 U. S. 55, 96 L. Ed. 86, 72 S. Ct. 141.

tary. We also call this Honorable Court's attention to *Lisbena v. California*,[5] as to the issue of prolonged questioning.

In *Turner v. Commonwealth*,[6] relied upon by petitioner, it appeared that whenever any of the officers involved in the case had any free time he would question the defendant. The defendant, in that case, was not informed of his rights; he was not permitted to see anyone and was falsely told that others had "opened up" on him. Such was not the case here. It might be added that the questioning officers, in the case at bar, had to drive about fifty or fifty-five miles, whenever they wanted to question petitioner.

In *Watts v. Indiana*,[7] the relay questioning procedure was continued until 3:00 O'clock in the morning. The accused, in that case, was denied food and sleep and placed in a cell where he had no place to sit or eat, except on the floor. He was not advised of his rights and was not permitted to see friends or family. For these reasons, *Turner v. Commonwealth*, supra, and *Watts v. Indiana*, supra, are inapplicable here. We contend that the testimony presented, does not lead to the conclusion that the confessions were obtained under such circumstances, as would show that lack of fundamental justice required by the Fourteenth Amendment.

---

[5] Lisbena v. California, 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280.

[6] Turner v. Commonwealth, 338 U. S. 62, 93 L. Ed. 1810.

[7] Watts v. Indiana, 338 U. S. 49, 93 L. Ed. 1081, 69 S. Ct. 1347.

I-B.

THERE WAS NO ERROR IN REFUSING TO PERMIT PETITIONER TO TESTIFY ON VOIR DIRE CONCERNING THE VOLUNTARINESS OF HIS CONFESSION WITHOUT SUBMITTING HIMSELF TO ANY CROSS-EXAMINATION.

Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14;

Palko v. Connecticut, 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149;

Adamson v. California, 332 U. S. 46, 91 L. Ed. 1903, 67 S. Ct. 1672, 171 A. L. R. 1223;

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674;

Foster v. Illinois, 332 U. S. 134, 91 L. Ed. 1955, 67 S. Ct. 1716;

Witt v. United States, 196 Fed. 2d 285, cert. denied 344 U. S. 827, 97 L. Ed. 644, 73 S. Ct. 28;

Stein v. New York, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077;

Alford v. United States, 282 U. S. 687, 75 L. Ed. 624, 51 S. Ct. 77;

Raffel v. United States, 271 U. S. 494, 70 L. Ed. 1054, 46 S. Ct. 566;

United States v. Gross, 103 Fed. 2d 11;

Powers v. United States, 223 U. S. 303, 56 L. Ed. 448, 32 S. Ct. 281:

Simon v. United States, 123 Fed. 2d 80, cert. denied 314 U. S. 694, 86 L. Ed. 555, 62 S. Ct. 411;

Commonwealth v. Smith, 163 Mass. 411, 40 N. E. 189;

Gonzales v. Texas, 272 S. W. 2d 524;

Lemore v. United States, 253 Fed. 887, cert. denied 248 U. S. 586, 63 L. Ed. 434, 39 S. Ct. 184;

Fay v. New York, 332 U. S. 261, 91 L. Ed. 2043.

This Court has often held that the guarantees of the first eight amendments to the Constitution of the United States are not made effective against state action by either the privileges and immunities clause or the due process clause of the Fourteenth Amendment to the Constitution of the United States.[8] This is true as to the protection against double jeopardy,[9] the right to counsel,[10] trial by jury,[11] and the privilege against self-incrimination.[12] The Fourteenth Amendment only comes into play in cases covered by the first eight amendments when the laws of a state deny an accused some element of fundamental justice.[13]

In Alabama, an accused may elect to remain silent or he may testify in his own behalf.[14] The Alabama Supreme Court has held that if he elects to testify he cannot restrict the nature of relevant testimony he proposes to give.[15] It has been so held again in the

---

[8] Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14; Palko v. Connecticut, 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149; Adamson v. California, 332 U. S. 46, 91 L. Ed. 1903, 67 S. Ct. 1672.

[9] Palko v. Connecticut, supra.

[10] Foster v. Illinois, 332 U. S. 134, 91 L. Ed. 1955, 67 S. Ct. 1716.

instant case.[16] We submit that such a construction of our constitutional provisions, the declared law of the State of Alabama, does not deprive the petitioner of any element of fundamental justice required by the Fourteenth Amendment.

We turn now to the case of *Witt v. United States.*[17] There the trial judge heard evidence concerning the voluntary character of the confession in the absence of the jury. He then ruled that the confession was voluntary. A witness for the government then testified to the statements in the presence of the jury. The defendant complained that he was not permitted the opportunity of testifying as to the voluntary aspect of his confession.

The Ninth Circuit Court of Appeals, held as follows: "Appellant claims that he was thereafter refused permission to take the stand in the jury's presence for the limited purpose of testifying as to the voluntary aspect of the confession. We do not so understand the record. *The court went no further than to suggest that if appellant testified he would subject himself to cross-examination.* Appellant was obviously free to take the stand and speak concerning any material

---

11 Fay v. New York, 332 U. S. 261, 91 L. Ed. 2043, 67 S. Ct. 1613; Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674.

12 Twining v. New Jersey, supra; Adamson v. California, supra.

13 Foster v. Illinois, supra; Palko v. Connecticut, supra.

14 Section 6, Constitution of Alabama 1901.

15 Kelly v. State, 160 Ala. 48, 49 So. 535; Carpenter v. State, 193, Ala. 51, 69 So. 531; Gast v. State, 232 Ala. 307, 167 So. 554; Brown v. State, 243 Ala. 529, 10 So. 2d 855.

16 See Record page 350.

17 Witt v. United States, 196 Fed. 2d 285.

matter inquired of him by his counsel. He could not well ask that the court guarantee him in advance that he would be asked no embarrassing questions on cross-examination if he did so. *If he had taken the stand and the court had permitted undue latitude in his cross-examination, he would have had something of substance to complain about.*" (Emphasis supplied.)

So it is here, the trial court informed the petitioner, in effect, that if he took the stand to testify on voir dire, he would submit himself to cross-examination.[18] Certainly, on a coercion issue the credibility of all witnesses is an important fact. If the defendant takes the stand he does so as any other witness.[19] Should the state be denied the opportunity of impeaching his credibility or of showing prior inconsistent statements? We submit that such is not the case. It was never intended that a defendant be given the benefits of remaining silent and the benefits of testifying at one and the same time.

The extent of cross-examination is within the sound discretion of the trial court and the exercise of that discretion will not be overturned except where abuse is shown.[20] If the trial court had permitted cross-examination of the petitioner, which was beyond the legitimate scope, then petitioner might have had something about which to complain. Under the circumstances here, however, petitioner would attempt to shield himself from all embarrassing questions of whatever nature.

We will next call this Honorable Court's attention to

---

[18] Record pages 230, 231.

[19] Raffel v. United States, 271 U. S. 494, 70 L. Ed. 1054, 46 S. Ct. 566.

[20] LeMore v. United States, 253 Fed. 887, cert. denied 248 U. S. 586, 63 L. Ed. 434, 39 S. Ct. 184;
Alford v. United States, 282 U. S. 687, 75 L. Ed. 624, 51 S. Ct. 77.

Stein v. New York.[21] In that case the defendants complained that they could not take the stand to testify to coercion in obtaining their confession without submitting themselves to general cross-examination. Recognizing the rule that the extent of cross-examination is largely within the discretion of the trial court, the Supreme Court noted that the defendants made no offer to testify, no matter how restricted the cross-examination might have been.

The court goes further, however, and states as follows:

> "Petitioners' attack is so unbounded and unqualified that it could prevail only if the Fourteenth Amendment were construed to allow them to testify to their coercion by the police, shielded from any cross examination whatever. If they had given such testimony, it would have been in direct conflict with that of the police, and the decision would depend on which was believable. Certainly the Constitution does not prohibit tests of credibility which American law uniformly applied to witnesses. If in open court, free from violence or threat of it, defendants had been obliged to admit incriminating facts, it might bear on the credibility of their claim that the same facts were admitted to the police only in response to beating. And if they became witnesses, does the Constitution compel the State to forego attack on their credibility

---

[21] Stein v. New York, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077.

by showing former convictions? . . . In trial of a coercion issue, as of every other issue, when the prosecution has made a case to go to the jury, an accused must choose between the disadvantage from silence and that from testifying. The Constitution safeguards the right of a defendant to remain silent; it does not assure him he may remain silent and still enjoy the advantages that might have resulted from testifying. We cannot say that petitioners have been denied a fair hearing of the coercion charge."

There as here, the accused sought to avail himself of two safeguards, one of remaining silent and the other of testifying. The fundamental justice required by the Fourteenth Amendment does not require so great a concession to any accused.

II.

NO EVIDENCE OF SYSTEMATIC EXCLUSION OF NEGROES, BECAUSE OF RACE, IS SHOWN AND THE TRIAL COURT PROPERLY DENIED THE MOTIONS TO QUASH.

Tarrance v. Florida, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402;

Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276;

Thomas v. Texas, 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 383;

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397;

Fay v. New York, 332 U. S. 261, 91 L. Ed. 2043.

The petitioner filed a motion to quash the indictment (R. p. 4) and a motion to quash the venire (R. p. 8). The grounds of these motions, variously stated, were that Negroes were systematically excluded from the jury rolls of Dallas County, Alabama, solely by reason of their race.

Discrimination of this type is not presumed but must be proved or admitted,[22] and the burden is placed upon the petitioner to establish such discrimination as would warrant this Court's reversal of the Supreme Court of Alabama.[23] It has often been held that fairness in selection does not require proportional representation.[24]

We call this Honorable Court's attention to the detailed testimony concerning the method of selecting jurors to fill the jury box from which names were drawn for petitioner's grand and petit juries. We submit that the jury commissioners of Dallas County, Alabama, were honestly and sincerely attempting to do their duty as required by the laws of Alabama and the United States. In the case of *Akins v. Texas*, supra, the jury commissioners increased the number of Negro jurors on the various jury panels after several cases had been reversed because of systematic exclusion of Negroes. This Court, in reviewing the *Akins* case, supra, remarked several times that the commissioners were obviously trying to follow the mandate of the Supreme Court of Texas and the Supreme Court of the United States. In examining the *Akins* case, supra. this Court, stated as follows:

---

[22] Tarrance v. Florida, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402.

[23] Akins vs. Texas, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

[24] Akins v. Texas, supra.

"While our duty, in reversing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, . . . we accord in that examination great respect to the conclusions of the state judiciary . . . . That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.'"

The Circuit Court of Dallas County, Alabama, having heard the testimony concerning the alleged discrimination overruled the motions to quash. The Supreme Court of Alabama, reviewing the evidence, held as follows:

"The indictment and trial here involved are controlled by the roll then made. The prior habit of the commissioners in respect to negroes on jury rolls can only serve to shed light on their conduct in making up the last jury roll. But that is not sufficient to overcome the direct positive evidence showing an effort in good faith to have the negro race fairly represented on the jury roll by negroes who are qualified and not exempt after indictments have been quashed for such previous failure. It is not appropriate to say that they are entitled to be represented in the same proportion as the whites are represented unless their qualifications are in the same proportion. That does not appear. The comparison without that is not an

accurate guide for a determination of the question. We think the trial court (fol. 814) properly overruled the motion to quash the indictment and the motion to quash the venire for use on the trial of this cause because, we think, the evidence fails to show that the jury commission systematically omitted qualified and not exempt negroes from the jury roll because they were negroes or discriminated against them on that account, and thereby deprived defendant of due process or the equal protection of the law. We think, therefore, there was no reversible error in that respect." (R. pp. 345, 346.)

The evidence supporting the conclusion of the Circuit Court of Dallas County, Alabama, and the Supreme Court of Alabama, is not so lacking that it works the fundamental unfairness which is condemned by this Court. We further call the attention of this Honorable Court to *Thomas v. Texas*,[25] where the Supreme Court of the United States gave great weight to the following statement by the Court of Criminal Appeals of Texas:

"It may be that the jury commissioners did not give the Negro race a full pro rata with the white race in the selection of the grand and petit juries in this case; still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty and did not in fact discriminate against the Negro race in the selection of the jury lists, then the Constitution of the United States has not been violated . . ."

This Court should not consider earlier incidents not connected with these juries or trials that suggest past discriminations.

---

[25] Thomas v. Texas, 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 383.

Cassell v. Texas,[26] is not applicable here. In that case the commissioners selected only jurors whom they knew and testified that they knew no eligible Negroes. In the instant case, the commissioners requested and received lists of names from which they could get qualified jurors, whether they knew them personally or not. Also the commissioners in the *Cassell* case, supra, hand-picked the sixteen jurors from which the judge selected twelve. On each list of sixteen, the name of one Negro was placed. The concurring opinion of Mr. Justice Frankfurter, points up the fact that the grand jury was the personal choice of commissioners. In the case at bar, the method of selection is, of course, different. As previously outlined some eighty jurors, both whites and colored, were drawn by lot from the box, placed in a hat, and eighteen names drawn for the grand jury. Since no identifying marks are used in Alabama on the cards in the jury box, the inclusion or exclusion of Negroes, on the venire is not by design but by chance.

It might further be pointed out that petitioner failed to show the number of persons within the statutory age group who were otherwise ineligible for jury duty, thereby rendering insufficient the census statistics relating to race in Alabama.[27]

In the instant case, the petitioner is found in the position of arguing against himself. He first complained that he was denied his constitutional rights because Negroes were systematically excluded because of race from the grand jury which indicted him. The trial court sustained his complaint and quashed the in-

---

[26] Cassell v. Texas, 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629.

[27] Fay v. New York, 332 U. S. 261, 91 L. Ed. 2043, 67 S. Ct. 1613.

dictment. Thereafter, in accordance with the law a new jury roll was prepared and the names of a substantial number of Negroes were placed in the box. Petitioner now challenges the indictment because the commissioners knew that they were the names of Negroes when they placed them on the roll. There appears to be no way of satisfying the petitioner in this matter. Under the Alabama statutes regarding the compilation of the jury rolls, which statutes are not attacked here, the commissioners are almost certain to know the race of prospective jurors. A certain amount of personal knowledge is necessary to determine the prospect's qualifications.

No token representation is attempted here. Rather, the commissioner used the same standards in selecting all jurors, regardless of race. No systematic exclusion of Negroes, because of race, is indicated either by the testimony or by inference.

CONCLUSION

The testimony fails to show that the confessions made by petitioner resulted from coercion. There was no showing that the statements were anything but voluntary. The trial court rightly refused to limit in advance the scope of petitioner's cross-examination. The Constitution does not require that courts extend to defendants the benefits of remaining silent and the benefits of testifying, at the same time. Further, it affirmatively appears that the jury commissioners of Dallas County, Alabama, honestly and conscientiously carried out their duties in compiling jury lists. There is no systematic

exclusion of Negroes shown. The Supreme Court of Alabama is due to be affirmed.

Respectfully submitted,

JOHN PATTERSON
Attorney General

ROBERT STRAUB
Special Assistant Attorney General
Attorneys for Respondent.